

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

MALCOLM D. HANSON,)	No. 2:23-cv-03112-JGB-JDE
Petitioner,)	
v.)	ORDER TO SHOW CAUSE WHY
TAMMY CAMPBELL, Warden,)	THE PETITION SHOULD NOT
Respondent.)	BE DISMISSED

I.

INTRODUCTION

On March 27, 2023,¹ Malcolm D. Hanson (“Petitioner”), a state prisoner, proceeding pro se and without paying the required filing fee or seeking leave to proceed in forma pauperis, constructively filed a Petition for Writ of Habeas Corpus by a Person in State Custody under 28 U.S.C. § 2254. Dkt. 1 (“Pet.” or “Petition”).

¹ Under the “mailbox rule,” “a legal document is deemed filed on the date a petitioner delivers it to the prison authorities for filing by mail.” Lott v. Mueller, 304 F.3d 918, 921 (9th Cir. 2002). In the absence of evidence to the contrary, courts have treated a petition as delivered to prison authorities on the date the petition is signed. Here, the Court will afford Petitioner the benefit of the mailbox rule and deems the Petition constructively filed on the signature date for purposes of this Order.

1 This appears to be the third habeas petition that Petitioner has filed in
 2 this Court challenging his 1999 conviction in Ventura County Superior Court
 3 (“Prior Conviction”). The first habeas petition was dismissed without prejudice
 4 as partially unexhausted on December 21, 2001. See Hanson v. Giurbino, Case
 5 No. 2:01-cv-05353-GLT-RZ, (C.D. Cal.) (“First Petition”), Dkt. 17-19.²
 6 Petitioner filed a second habeas petition in this Court on June 14, 2016,
 7 challenging both his Prior Conviction and a 2014 resentencing proceeding. See
 8 Hanson v. Baughman, Case No. 2:16-cv-04250-JGB-JDE, (C.D. Cal.)
 9 (“Second Petition”), Dkt. 1. That petition was denied and dismissed with
 10 prejudice on October 3, 2017. Id. Dkt. 18, 21-22.

11 In accordance with Rule 4 of the Rules Governing Section 2254 Cases in
 12 the United States District Courts (“Habeas Rules”), the Court has reviewed the
 13 instant Petition and finds it appears to suffer from several defects, rendering it
 14 subject to dismissal.

15 II.

16 PETITIONER’S CLAIMS

17 1. Petitioner’s conviction must be overturned because his admission
 18 to the prior conviction allegations was not voluntarily and knowingly made.
 19 Pet. at 4-6, 16 (CM/ECF pagination).

20 2. Petitioner received ineffective assistance of counsel. Pet. at 4.

21 3. “Vindictive Prosecution” based on Petitioner’s “plea agreement”
 22 regarding the prior conviction allegations. Pet. at 7.

23
 24 ² Pursuant to Fed. R. Evid. 201, the Court takes judicial notice of Petitioner’s
 25 prior actions filed in state and federal courts. See United States v. Raygoza-Garcia,
 26 902 F.3d 994, 1001 (9th Cir. 2018) (“A court may take judicial notice of undisputed
 27 matters of public record, which may include court records available through [the
 28 Public Access to Court Electronic Records.]”); Holder v. Holder, 305 F.3d 854, 866
 (9th Cir. 2002) (taking judicial notice of opinion and briefs filed in another
 proceeding).

1 **III.**

2 **DISCUSSION**

3 Pursuant to Rule 4 of the Habeas Rules, the Court must review the
 4 Petition and, if it plainly appears from the Petition and any attached exhibits
 5 that Petitioner is not entitled to relief, the Court must dismiss the Petition.
 6 Here, the Petition appears subject to dismissal for at least four reasons: (1) it is
 7 second and/or successive; (2) it is untimely; (3) it was filed on the wrong form;
 8 and (4) it is potentially mixed or wholly unexhausted.

9 **A. The Petition Appears Second And/or Successive**

10 The Antiterrorism and Effective Death Penalty Act of 1996 (the
 11 “AEDPA”) “greatly restricts the power of federal courts to award relief to state
 12 prisoners who file second or successive habeas corpus applications.” Tyler v.
 13 Cain, 533 U.S. 656, 661 (2001). Title 28, United States Code, Section 2244(b)
 14 provides, in pertinent part, as follows:

15 (1) A claim presented in a second or successive habeas
 16 corpus application under section 2254 that was presented in a prior
 17 application shall be dismissed.

18 (2) A claim presented in a second or successive habeas
 19 corpus application under section 2254 that was not presented in a
 20 prior application shall be dismissed unless—

21 (A) the applicant shows that the claim relies on a new
 22 rule of constitutional law, made retroactive to cases on
 23 collateral review by the Supreme Court, that was previously
 24 unavailable; or

25 (B)(i) the factual predicate for the claim could not have
 26 been discovered previously through the exercise of due
 27 diligence; and

28 (ii) the facts underlying the claim, if proven and

1 viewed in light of the evidence as a whole, would be
2 sufficient to establish by clear and convincing evidence that,
3 but for constitutional error, no reasonable factfinder would
4 have found the applicant guilty of the underlying offense.

5 (3)(A) Before a second or successive application permitted
6 by this section is filed in the district court, the applicant shall move
7 in the appropriate court of appeals for an order authorizing the
8 district court to consider the application.

9 A petitioner's failure to obtain authorization from the appropriate
10 appellate court before filing a second or successive habeas petition deprives the
11 district court of jurisdiction to consider the petition. See Burton v. Stewart, 549
12 U.S. 147, 157 (2007) (per curiam); Cooper v. Calderon, 274 F.3d 1270, 1274
13 (9th Cir. 2001) (per curiam).

14 Here, Petitioner's claims challenge the validity of his Prior Conviction.
15 As noted, however, Petitioner previously challenged the same conviction in a
16 prior habeas corpus petition filed in this Court, which was adjudicated on the
17 merits. In the Second Petition,³ Petitioner primarily challenged the 2014
18 resentencing proceedings, but also raised two claims that appeared to relate to
19 his Prior Conviction. See Second Petition, Dkt. 1 at 6, 23-26 (CM/ECF
20 pagination). In analyzing these grounds for relief, the undersigned initially
21 noted that these claims implicated timeliness concerns, but ultimately
22 concluded it was unnecessary to resolve that issue because the claims
23 substantively did not support federal habeas relief. Id., Dkt. 18 at 26-28. On
24

25 ³ The First Petition does not implicate Section 2244(b)'s filing restrictions
26 because it was dismissed without prejudice for failure to exhaust state remedies. See
27 Slack v. McDaniel, 529 U.S. 473, 485-86 (2000) ("A habeas petition filed in the
28 district court after an initial habeas petition was adjudicated on its merits and
dismissed for failure to exhaust state remedies is not a second or successive
petition."); In re Turner, 101 F.3d 1323, 1323 (9th Cir. 1997) (as amended).

1 October 3, 2017, the district court entered judgment on the Second Petition,
2 denying the petition and dismissing the action with prejudice. Id., Dkt. 22.
3 Both the district court and Ninth Circuit Court of Appeals denied a certificate
4 of appealability. Id., Dkt. 20, 26-27.

5 Thus, the Petition now pending appears to constitute a second and/or
6 successive petition challenging the same Prior Conviction and as such,
7 Petitioner must obtain permission from the Ninth Circuit before this Court can
8 adjudicate the issues raised by the Petition. Petitioner did not include a copy of
9 an order by the Ninth Circuit authorizing this Court to consider the Petition
10 and the Court has not independently been able to locate any such order in a
11 search of online records of the Ninth Circuit. Absent such authorization, it
12 appears the Court lacks jurisdiction to adjudicate Petitioner's claims
13 challenging his Prior Conviction.

14 **B. The Petition Appears Facially Untimely**

15 District courts are permitted to consider, sua sponte, whether a petition
16 is untimely and to dismiss a petition that is untimely on its face after providing
17 the petitioner with the opportunity to be heard. Day v. McDonough, 547 U.S.
18 198, 209-10 (2006); Wentzell v. Neven, 674 F.3d 1124, 1126 (9th Cir. 2012). In
19 addition to being second and/or successive, the Petition appears untimely.

20 Because the Petition was filed after the AEDPA, it is subject to the
21 AEDPA's one-year statute of limitations, as set forth at 28 U.S.C. § 2244(d).
22 See Soto v. Ryan, 760 F.3d 947, 956-57 (9th Cir. 2014). Ordinarily, the
23 limitations period runs from the date on which the prisoner's judgment of
24 conviction "became final by the conclusion of direct review or the expiration of
25 the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). Petitioner does
26 not appear to contend that he is entitled to a later trigger date under 28 U.S.C.
27 § 2244(d)(1)(B)-(D), and the Court finds no basis for applying a later trigger
28 date. As such, Section 2244(d)(1)(A) governs in this case.

1 On December 18, 1998, a Ventura County Superior Court jury found
2 Petitioner guilty of assault with a deadly weapon by means likely to produce
3 great bodily injury and battery with serious bodily injury. Petitioner admitted
4 to suffering two prior serious felony convictions and serving two prior prison
5 terms. On March 11, 1999, the trial court sentenced Petitioner to 25 years to
6 life. Pet. at 16-17; Second Petition, Dkt. 1 at 2; id., Dkt. 18 at 2-3.

7 Petitioner appealed his conviction and on April 3, 2000, the California
8 Court of Appeal denied the appeal. Petitioner's Petition for Review was denied
9 on June 14, 2000. Second Action, Dkt. 1 at 2-3; id., Dkt.18 at 3. As it appears
10 Petitioner did not file a petition for writ of certiorari (Pet. at 2), his conviction
11 became final 90 days later, on September 12, 2000, when the period in which
12 to petition the United States Supreme Court for a writ of certiorari expired. See
13 Harris v. Carter, 515 F.3d 1051, 1053 n.1 (9th Cir. 2008); Bowen v. Roe, 188
14 F.3d 1157, 1158-59 (9th Cir. 1999). The AEDPA's one-year limitations period
15 expired one year later on September 12, 2001. As noted, Petitioner did not
16 constructively file the instant Petition until March 27, 2023, more than twenty
17 years after the expiration of the limitations period. Thus, absent tolling, the
18 Petition appears untimely.

19 The burden of demonstrating that the AEDPA's one-year limitations
20 period was sufficiently tolled, whether statutorily or equitably, rests with the
21 petitioner. See, e.g., Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005); Zepeda v.
22 Walker, 581 F.3d 1013, 1019 (9th Cir. 2009); Miranda v. Castro, 292 F.3d
23 1063, 1065 (9th Cir. 2002). "A habeas petitioner is entitled to statutory tolling
24 of AEDPA's one-year statute of limitations while a 'properly filed application
25 for State post-conviction or other collateral review with respect to the pertinent
26 judgment or claim is pending.'" Nedds v. Calderon, 678 F.3d 777, 780 (9th
27 Cir. 2012) (quoting 28 U.S.C. § 2244(d)(2)). Here, Petitioner does not appear
28 to be entitled to any statutory tolling of the limitations period under 28 U.S.C.

1 § 2244(d)(2) as it appears he did not file any habeas petitions in state court
2 prior to the expiration of the limitations period. See Pet. at 2.

3 In addition to statutory tolling, the AEDPA's one-year limitations period
4 also is subject to equitable tolling in appropriate cases. See Holland v. Florida,
5 560 U.S. 631, 649 (2010). In order to be entitled to equitable tolling, the
6 petitioner must show both that: (1) "he has been pursuing his rights diligently";
7 and (2) "'some extraordinary circumstance stood in his way' and prevented
8 timely filing." Id. (quoting Pace, 544 U.S. at 418). The "threshold necessary to
9 trigger equitable tolling [under the AEDPA] is very high, lest the exceptions
10 swallow the rule." Bills v. Clark, 628 F.3d 1092, 1097 (9th Cir. 2010) (citation
11 omitted). Here, Petitioner does not claim entitlement to equitable tolling and
12 the Court has not found any basis to support such a claim. Thus, equitable
13 tolling does not appear to render the Petition timely.

14 **C. Other Defects**

15 The Petition was not submitted on a form approved by this district. Rule
16 2(d) of the Habeas Rules authorizes district courts to require habeas petitions
17 be filed in a form prescribed by the Local Rules. This Court has such a Local
18 Rule. See Local Rule 83-16.1 ("A petition for writ of habeas corpus . . . shall be
19 submitted on the forms approved and supplied by the Court."). The Petition is
20 subject to dismissal for failure to use a Court-approved form.

21 Separately, under 28 U.S.C. § 2254(b), federal habeas relief may not be
22 granted unless the petitioner has exhausted the remedies available in state
23 courts or an exception to the exhaustion requirement applies. Exhaustion
24 requires that the petitioner's claims be fairly presented to the state courts and
25 be disposed of on the merits by the highest court of the state. James v. Borg, 24
26 F.3d 20, 24 (9th Cir. 1994); Carothers v. Rhay, 594 F.2d 225, 228 (9th Cir.
27 1979); see also Libberton v. Ryan, 583 F.3d 1147, 1164 (9th Cir. 2009). A
28 claim has not been fairly presented to a state court unless the petitioner has

described both the operative facts and the federal legal theory on which the claim is based. See Duncan v. Henry, 513 U.S. 364, 365-66 (1995) (per curiam); Picard v. Connor, 404 U.S. 270, 275-78 (1971); Greenway v. Schriro, 653 F.3d 790, 801 (9th Cir. 2011). As a matter of comity, a federal court will not entertain a habeas corpus petition unless the petitioner has exhausted the available state judicial remedies on every ground presented in the petition. See Rose v. Lundy, 455 U.S. 509, 518-22 (1982). Petitioner has the burden of demonstrating that he has exhausted his available state remedies. See, e.g., Williams v. Craven, 460 F.2d 1253, 1254 (9th Cir. 1972) (per curiam). Here, because Petitioner did not use an approved form that would require information about exhaustion, the Court cannot determine whether his claims have been exhausted, but notes that his response to Question No. 13 on the form habeas petition suggests the Petition is either mixed or wholly unexhausted. Specifically, in response to the question asking Petitioner to identify any claims that have not been presented to any other courts and the reasons for that failure, Petitioner responded, “Ineffective Assistance of Counsel And Fraud.” Pet. at 7.

IV.

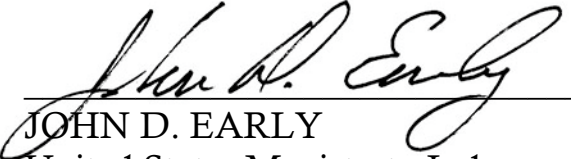
CONCLUSION AND ORDER

For the foregoing reasons, the Petition is subject to dismissal. Petitioner is ORDERED TO SHOW CAUSE, in writing, by no later than thirty (30) days from the date of this Order, why this action should not be dismissed under Habeas Rule 4 for the reasons stated above.

Instead of filing a response to the instant Order, Petitioner may request a voluntary dismissal of this action pursuant to Federal Rule of Civil Procedure 41(a). The Clerk is directed to provide a Notice of Dismissal form. However, the Court warns any dismissed claims remain subject to the statute of limitations under Section 2244(d)(1).

1 Petitioner is cautioned that a failure to respond timely in compliance
2 with this Order may result in this action being dismissed for the foregoing
3 reasons, for failure to prosecute, and for failure to comply with a Court order.
4 See Fed. R. Civ. P. 41(b).

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6 Dated: May 01, 2023

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8 
9 JOHN D. EARLY
United States Magistrate Judge